IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

THURSDAY, THE 8TH FEBRUARY 2007 / 19TH MAGHA 1928

WP(C).No. 15088 of 2006(U)

OS.64/2006 of MUN-MAGI COURT, SASTHAMCOTTA
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PETITIONER:

P.K. MATHAI VAIDYAN,
PUTHEN PURACKAL, CHAVADIYIL, MADAPPA MURI,
THOTTUMUGHAM P.O., MYNAGAPPALLY,
KOLLAM DISTRICT.

BY ADV. SRI.B.MOHANLAL
SMT.MEREENA JOSEPH

RESPONDENTS:
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1. THE DISTRICT COLLECTOR, COLLECTORATE,
KOLLAM.

2. THE REVENUE DIVISIONAL OFFICER,
COLLECTORATE, KOLLAM.

3. THE TAHSILDAR, TALUK OFFICE,
KUNNATHOOR, SASTHAMCOTTAH, KOLLAM.

4. THE VILLAGE OFFICER,
MYNAGAPPALLY VILLAGE, SASTHAMCOTTAH,
KOLLAM.

5. T.K. GEORGE VAIDYAN,
THENGUVILA VEEDU, KADAPPA MURI,
MYNAGAPPALLY VILLAGE, SASTHAMCOTTAH, KOLLAM.

6. MOHAN T. GEORGE, THENGUVILA VEEDU,
KADAPPA MURI, MYNAGAPPALLY VILLAGE,
SASTHAMCOTTAH, KOLLAM.

BY ADV. SRI.K.SUBASH CHANDRA BOSE
R1 TO 3 BY PUBLIC PROSECUTORMR. K.C.SANTHOSHKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-9-2006, THE COURT ON 8-2-2007 DELIVERED THE FOLLOWING:

K.R. UDAYABHANU, J.

W.P.C.NO.15088 OF 2006

DATED THIS THE 8TH DAY OF FEBRUARY 2007

ORDER

The writ petitioner has sought for implementation of Ext.P1 order issued by the R.D.O.above two years back with respect to his petition to have the nuisance perpetrated by R5 & R6 removed. Respondents 1 to 4 in the writ petition are the revenue authorities and 5 and 6 are the alleged owners of the neighbouring property. It is his case that respondents 5 and 6 who are in possession of the properties on the northern side of his property is causing him serious problems as the branches of the rubber trees planted in the property of the above persons are hanging over his property preventing sunlight and causing obstruction and injury to the petitioner and his family. The request made to the 5th respondent to cut and remove the trees were not complied with and hence steps were initiated under Section 133 of the Code of Criminal Procedure for direction to cut and remove the above rubber trees. The 2nd respondent/R.D.O.as per order dated 1-11-2004 directed the 5th respondent to cut and

remove the branches of the trees within 15 days and the 4th respondent, the Village Officer was directed to enforce the above order. At the time when steps were taken to enforce the order, respondent No.6 instituted O.S.No.64/2006 before the Munsiff Court, Sasthamcottah arraying respondents 1 to 5 as defendants in the suit for an injunction restraining the respondents from cutting and removing the branches of the rubber trees. He has also sought for an interim injunction in this regard. The petitioner has entered appearance and filed his objections. Thereafter, the revenue authorities are declining to implement the order under the protext that the matter is pending before the civil court. It is alleged that respondents 1 to 4 have colluded with respondents 5 and 6 so that Ext.P1 order is not implemented. It is apprehended that in the heavy rain it is very much likely that the overhanging branches of the rubber trees will fall and the same will cause imminent danger to the petitioner and his family. It is pointed out that respondents 5 and 6 are father and son and they are residing in the property. It is the case of the petitioner that Ext.P1 order and the suit cannot be mixed up and the R.D.O.is having power to implement

the order and that the civil court has no jurisdiction to interfere with Ext.P1 order.

2. The 6th respondent has filed a counter affidavit pointing out that he is not a party in Ext.P1 proceedings and hence Ext.P1 order is arbitrary and illegal and hence the same cannot be implemented as well. It is totally denied that the rubber trees standing in his property is causing obstruction of nuisance to the petitioner. The property belonged to him and hence the order with respect to the trees in his property without hearing him is per se illegal. It is pointed out that he (6th respondent) is the owner in possession of 89.89 Ares of land and the trees standing therein vide the settlement deed dated 27-2-1985. He has also effected mutation and is paying tax. He has also produced the above records. The 5th respondent is his father and used to occasionally reside with him. The petitioner under the guise of Ext.P1 order attempted to encroach into his property and hence he was constrained to initiate proceedings in the civil court vide O.S.No.68/2006. It is also alleged that the writ petitioner is entertaining a grouse against him as he had complained to the authorities when the petitioner converted the

paddy field for planting rubber trees. It is only to retaliate that the proceedings under Section 133 Cr.P.C. has been initiated.

3. The petitioner has filed a reply affidavit alleging that the 5th and 6th respondents are residing together. It is further alleged that he had impleaded the 6th respondent in Section 133 proceedings and notice was also issued to him. He has produced a copy of the notice in this regard. According to him, the 2nd respondent/R.D.O.had heard both of them before passing Ext.P1 order.

4. The petitioner has relied on the decision reported in **P.C.Khader v. P.K.Khader, 1988 (1)K.L.T.302** to point out that the respondents ought to have contested the matter before the R.D.O. According to him, Ext.P1 order is issued after notice to respondents 5 and 6 and the proper remedy available to the 6th respondent is to appear before the Sub Divisional Magistrate/Revenue Divisional Officer and file his objections therein. On the other hand the counsel for the respondents has relied on the decision reported in **Vasant Manga Nikumba v. Baburao Bhikanna Naidu, 1995 Supp.(4)SCC 54** to stress the fact that Section 133 envisages removal of only public

nuisance and not to deal with a matter in dispute between two persons exclusively. It has also to be established that the nuisance alleged is public nuisance should be of such a nature that if the magistrate fails to take immediate recourse to Section 133 irreparable damage would be done to the public. The condition precedent to exercise the power under Section 133 is the imminent danger to the property and consequential nuisance to the public. The section is limited to injuries likely to be caused to the passers-by or persons living or carrying on business in the neighbourhood.

5. I find that Ext.P1 is in the nature of a preliminary order directing the 5th respondent to cut and remove the overhanging branches of the rubber trees and that if there is any objection, he should represent it before the R.D.O. Evidently the situation alleged cannot be said to be one of a nature that is envisaged as a public nuisance. There is no allegation that the overhanging trees would result in any imminent danger to the petitioner. The petitioner has not produced copy of the complaint before the R.D.O. Further more, Ext.P1 order is directed only against the 5th respondent and not to the 6th respondent. It is not disputed

that the 6th respondent is not the owner of the property. Hence, Ext.P1 order directing the 5th respondent to cut and remove the overhanging branches of the trees belonging to the properties of the 6th respondent cannot be executed. Further more, I find that the matter is pending before the civil court. Hence, the revenue authorities cannot be found fault with for executing the order when the matter is pending before the civil court. In the circumstances, I find that there is no merit in the writ petition filed. The same is dismissed. All the same, the Munsiff, Sasthamcotta is directed to dispose of the interim injunction application filed in O.S.No.64/2006 at the earliest after hearing both sides.

Sd/-

K.R.UDAYABHANU, JUDGE

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P.S.TO JUDGE